United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7180

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TRAMP SHIPPING CO., INC.,
Plaintiff-Appellee,

-against-

GOTAAS LARSEN A.S., SANKO STEAMSHIP CO., LTD., PARABOLA SHIPPING UK LTD., HIMOFF MARITIME ENTERPRISES, LTD.,
Defendants-Appellees,

B

Docket No. 76-7180

and

-against-

EMERALD SHIPPING CORP. (LIBERIA),
Defendant-Intervenor-Appellee,

P/S

and

-against-

MARDORF PEACH & CO. LTD.,
Defendant-Appellant.

On appeal from the United States District Court Southern District of New York

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Brief on behalf of Defendants-Appellees, Parabola Shipping UK Ltd., and Himoff Maritime Enterprises, Ltd.

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BRIEF ON BEHALF OF DEFENDANTS-APPELLEES, PARABOLA SHIPPING UK LTD., and HIMOFF MARITIME ENTERPRISES, LTD.

STATEMENT

This appeal by appellant, Mardorf Peach & Co., Ltd., (hereinafter referred to as "Mardorf"), is merely a frivolous expression of its displeasure with the District Court's exercise of its broad discretion in compelling a consolidated arbitration

proceeding as allowed by Rule 42 (a) and Rule 81 (a)(3) of the Federal Rules of Civil Procedure. Despite the fact that all of the parties to this litigation, except Mardorf, have alleged their respective charters to the succeeding subcharterer, each of which charter contains an identical arbitration clause, Mardorf chooses to ignore the existence of these charters, including the one it has with defendant-appellee, Himoff Maritime Enterprises, Ltd. (hereinafter referred to as "Himoff"), for no apparent reason other than to avoid its participation in the resolution of a matter in which it is clearly involved.

STATEMENT OF ISSUES

Mardorf is asking this Court to reverse the decision of the District Court because the parties did not formalize their respective arbitrations sufficiently for the District Court to consolidate them. Plaintiff-Appellee, of course, demanded arbitration in its complaint and Himoff, through its attorneys, in addition to its allegations in its cross-claim against Mardorf, wrote a letter to Mardorf on August 7, 1975 demanding arbitration (App 132a), to satisfy Mardorf's insistence that no arbitration between Himoff and Mardorf could be considered until certain formalities were observed. The absurdity of Mardorf's argument is immediately evident when we consider that all of the parties to this litigation alleged their respective arbitration clauses and all of the parties, except Mardorf, joined plaintiff-appellee in its demand for consolidated arbitration and all of the parties, except Mardorf, here and now are seeking affirmance of the District Court's decision ordering a consolidated arbitration. What more evidence does Mardorf need to assure it that all of the litigants

want a consolidated arbitration?

Mardorf also attempts to break the chain by questioning the existence of the oral charter between defendant-appellee, Parabola Shipping UK, Ltd., (hereinafter referred to as "Parabola"), and Himoff and by alleging Himoff's bankruptcy. These are matters which concern only Parabola and Himoff. Since neither of them * raised any issue as to the existence of the oral charter containing the same provisions as the other charters (App 154a) and since Himoff has not raised its bankruptcy as a defense to the Parabola charter, there is no issue for Mardorf to raise and, therefore, the chain is not broken.

STATEMENT OF THE CASE

Plaintiff-Appellee, as owner of the M/V AGIA ERINI II, instituted suit against its charterer and all subcharterers alleging damage to said vessel which occurred on a voyage to the Port of Churchill, Manitoba, Canada, where she was to load a cargo of grain. The complaint alleges that the damage occurred upon arrival at Churchill "because of the presence of ice, the movement of aids to navigation off their station due to ice, foul weather, inadequate tug, pilotage, and port facilities" (App 8a). The complaint alleges that the vessel sustained this damage while entering the port, while proceeding to her berth, while at her berth, and also while leaving the port (App 8a). Plaintiff-Appellee alleges breach of the warranties set forth in Clauses 6 and 25 of its charter party and the similar provisions of the subcharter parties (App 8a).

All of the charter parties contain the same Clauses 6 and 25 which provide that the cargo be laden and/or discharged in any dock or at any wharf or place that Charterers or their Agents may direct provided the vessel can safely lie afloat at any time of tide (Clause 6) and that the vessel shall not be required to enter any ice bound port or any port where lights or light ships have been or are about to be withdrawn by reason of ice, or where there is risk that in the ordinary course of things, the vessel will not be able on account of ice to safely enter the port or to get out after having completed loading or discharging (Clause 25).

Plaintiff-Appellee moved for a consolidated arbitration pursuant to Rule 42 (a) and Rule 81 (a)(3) of the Federal Rules of Civil Procedure. By memorandum decision and order dated August 6, 1975, (App 64a-67a) the District Court found that the complaint sounded in both negligence and contract with reference to the common covenant of safe port and safe berth and that issue as well as the issue of damages is common as between all defendants and the plaintiffs. The District Court also found that, since all the charter parties provided for arbitration, the parties were directed to participate in a consolidated arbitration proceeding.

When Mardorf appeared in the action and objected to the consolidated arbitration, the District Court, after a hearing, filed another memorandum decision (App 162a-164a) adhering to its original decision and pointing out that, with respect to the question of the common question of fact and law, the warranties contained in Clauses 6 and 25 in each of the

charters including the Mardorf charter are identical and give rise to the common questions of fact and law. The District Court also concluded that Mardorf failed to make a sufficient showing as to the possible prejudice which would accrue to it in a consolidated arbitration proceeding. The District Court also found that Mardorf's claim that Himoff's demand for arbitration is insufficient under the circumstances obtaining in this case is specious. The Court concluded as follows:

> "In the interests of judicial and arbitrational economy, the prevention of possible inconsistent results and the minimization of time and expense to the parties, the court in its discretion orders the consolidated arbitration."

POINT I

THE DISTRICT COURT HAS BROAD DISCRETION TO ORDER CONSOLIDATION

The pertinent provisions of Clauses 6 and 25 of the charter party, relating to a safe place to load cargo and relating also to an ice bound port, are relevant to the facts of this case. Since the fundamental fact and law issues will be substantially similar, consolidation is certainly appropriate. Stein, Hall & Co. v. Scindia Steam Navigation Co. 264 F. Supp. 499 (SDNY 1967). Furthermore, the District Court has broad discretion in ordering consolidation. Rando v. Luckenbach Steamship Co. 155 F. Supp. 220 (EDNY 1957).

POINT II

MARDORF SEEKS TO BREAK THE CHAIN OF CHARTERS BY CREATING ISSUES THAT DO NOT EXIST

Himoff has not raised any issue as to the existence or validity of its charter with Parabola. Parabola and Himoff support consolidated arbitration and their evidence at the

arbitration can be expected to conform to their position in support of consolidation. Nevertheless, Mardorf presumes to speak for Parabola and Himoff and, in effect, tells them that despite their protestations to the contrary, there are issues between them relating to the existence of their charter agreement. Mardorf does not offer one bit of evidence in support of its position on this issue that it seeks to create nor will it be able to offer any such evidence in the future. Consequently, Mardorf's effort to escape the appropriate forum for the resolution of this case should be rejected.

CONCLUSION

The orders of the District Court compelling consolidated arbitration should be affirmed.

Respectfully submitted,

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